I. Introduction

Modern Enlightenment based constitutionalism accords secularism a privileged position: by remaining secular, the public sphere should warrant neutrality among religions and among the latter and non-religious ideologies in order to provide an optimal setting for the realization of freedom of religion as well as of freedom from religion. Thus conceived, secularism (which will be hereinafter referred to as ‘institutional secularism’) not only protects against state preferences for religion, or for one among many of them, but also protects religion from the state—to the

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extent that state endorsement of a religion may entail an unwelcome state meddling into religious affairs. In recent decades, however, secularism has come under intense attack from a number of different quarters intent on dislodging it from its constitutional pedestal. Some of these attacks have targeted secularism’s claim to neutrality from religious as well as non-religious perspectives. Proponents of religious views have thus accused secularism of bias in favor of atheism or of the ‘religion’ of ‘secular humanism’. On the other hand, postmodernism has built upon the ‘disenchantment of reason’ to question secularism’s coupling with reason and distancing from faith, which were meant to lend the principal support to secularism’s claim to neutrality. Furthermore, even if secularism were plausibly neutral, it would still be subject to attack as being pernicious for fostering relativism and a vacuum of commonly shared positive values bound to culminate in a ‘naked public square’.

Once dethroned, secularism can give constitutional way to the polity’s dominant religion, to religion against non-religious conceptions of the good, to religion repackaged as a key component of culture or to a vast number of possible permutations involving competition among various religious and non-religious ideologies. So long as secularism is the target and as its constitutionally privileged place is perceived as not fully eliminated, it can easily be portrayed as benefitting from an unfair advantage in the clash of ideologies. But what if secularism lost all

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2 See Michel Rosenfeld, Law, Justice and the Clash of Cultures: A Pluralist Account (2011), 180, n 44.
4 See Rosenfeld, Law, Justice and the Clash of Cultures 7-8.
7 For example, although the U.S. Constitution enshrines secularism by prohibiting the ‘establishment of religion’, U.S. Const., Amend. I (1791), there has been a long ongoing battle aimed at suppressing state promotion of secularism, see eg The State of Tennessee v Scopes, 152 Tenn. 424 (1925) (attempt to prohibit teaching evolution theory), and to impose state promotion of religious doctrine, see eg Edwards v Aguillard, 482 US 578 (1987) (attempt to impose teaching of creationism in science classes).
priority, preference or advantage in the constitutional firmament? In that case, should secularism stand on an equal footing with religion? Or should it be cast as the irreligious or anti-religious in a struggle against religion? Or else, should secularism reemerge as *primus inter pares* or, on the contrary, as subordinate among all existing competing conceptions of the good?

In this Chapter, I will explore the case for secularism as one of many conceptions of the good (which will be hereinafter referred to as ‘ideological secularism’\(^8\)) in a post-secular constitutional polity. I will approach secularism from within or, in other words, as it would be perceived by someone who has embraced it as providing the best way of life as far as he or she is concerned. In this sense, secularism is no different than is a religion as perceived by a believer who is convinced of its truth. If within the aegis of the secular constitutional age, institutional secularism can be conceived as rising above the clash of religions, in the post-secular age, in contrast, (ideological) secularism is confined to being a conception of the good in its own right suited to coexist to a larger or lesser degree with all other such conceptions within the polity.\(^9\)

As liberalism and its commitment to individualism and to ‘public reason’\(^10\) may go hand in hand with secularism or may at least result in a strong bias in favor of the latter, I will examine the case from within (ideological) secularism consistent with a pluralist as opposed to a liberal conception of the optimal constitutional ordering of the relation between religion and the state. Whereas I have provided an extensive account of normative pluralism elsewhere,\(^11\) for present

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\(^8\) “Ideology” has many different connotations ranging from the equivalent of a “world view” to that of “false consciousness” and is thus an essentially contested term. See Etienne Balibar, *Saeculum: Culture, religion, ideologie* (2012), 66-67. As used here, “ideology” is largely equated with “conception of the good”.

\(^9\) Secularism could also conceivably be absolutely incompatible with a competing conception of the good such as a fundamentalist religion imposing a comprehensive dogma that would vehemently militate against all science and all liberal rights and values.


\(^11\) See Rosenfeld, *Law, Justice and the Clash of Cultures* for an elaboration of the theory of ‘comprehensive pluralism’.
purposes suffice it to stress the following essentials. For pluralism, in any setting in which there are a plurality of conceptions of the good—and this is the case for all contemporary constitutional democracies—the promotion of peaceful coexistence among the greatest possible number of conceptions of the good found within that setting is a paramount normative objective that must be pursued through constitutional ordering and rule as well as through other means not relevant here. Unlike liberalism, pluralism is not biased as between the individual and the group. Moreover, strictly speaking, for a pluralist *prima facie* all conceptions of the good are of equal worth, thus imposing a presumption of full equality as between secularism and all competing religious and non-religious conceptions of the good. In other words, all conceptions of the good have an *ex ante* equal claim to full recognition though they may well fare very differently *ex post* after subjection to the standard of peaceful coexistence among the greatest possible number of competing conceptions of the good within the relevant polity. Thus, for example, a religion that commands holy war against the infidel, a religion that prescribes pacifism and mutual toleration above all, and a secular ideology would all start with an equal claim to recognition and respect, but the former religion would eventually fare much worse under the peaceful coexistence standard than its pacifist counterpart or than most familiar versions of ideological secularism.

In order to determine how secularism as one conception of the good among many would fare in a pluralist constitutional ordering of religion and the state and to figure out what, if any, place or function it ought to have within the constitutional ordering in question, this Chapter proceeds as follows. Part I concentrates on the *ex ante* case for secularism as a conception of the good by inquiring both what secularism would need from the polity and what it would wish to impose on the latter. Part II focuses on secularism as a competing conception of the good in a setting that includes a fundamentalist religion, a non-fundamentalist non-liberal religion, or, in other words a
‘strong religion’\textsuperscript{12}, and a liberal religion. Part III details how pluralism’s peaceful coexistence standard would mediate among the competing ideologies discussed in Part II in order to effectuate the transition from \textit{ex ante} to \textit{ex post} within a pluralist constitutional order. Finally, Part IV sketches out the place and function of ideological secularism in a pluralist constitutional ordering of the relation between religion and the state and contrasts that place and function to that of institutional secularism in the Enlightenment-based liberal constitutional order.

\textbf{II. Secularism’s Aspirations for Itself and for the World}

‘Secularism’ is an essentially contested concept both in the context of philosophy or ideology and in that of constitutional law.\textsuperscript{13} As it emerges from the project of the Enlightenment, secularism is epistemologically grounded in a strong split between Faith and Reason and it places exclusive reliance on the latter in terms of its own \textit{modus operandum} while remaining tolerant of religion so long as the latter is relegated to the private sphere. Viewed as a conception of the good on its own right, on the other hand, secularism is perhaps best captured in Charles Taylor’s formulation:

\begin{quote}
I would like to claim that the coming of modern secularity… has been coterminous with the rise of a society in which for the first time in history a purely self-sufficient humanism came to be as a widely available option. I mean by this a humanism accepting no final goals beyond human flourishing, nor any allegiance to anything else beyond this flourishing.\textsuperscript{14}
\end{quote}

Thus, following Taylor’s admittedly oversimplified, but for our purposes sufficient, characterization of religion in terms of transcendence, secularism is a conception of the good unshakably anchored in an immanent order that rejects all transcendence from an

\textsuperscript{12} See Andras Sajo chapter in this volume. Sajo does not distinguish as between fundamentalist and strong religion as I do here as for his purposes they both raise similar challenges in relation to constitutional ordering and handling.

\textsuperscript{13} See Andras Sajo, ‘Preliminaries to a Concept of Constitutional Secularism’ (2008) 6 \textit{Journal of Constitutional Law} 605, 609 (‘secularism’ as uncertain qua legal concept).

\textsuperscript{14} Charles Taylor, \textit{A Secular Age} (2007), 18.
epistemological, ontological, moral and political standpoint. It is important to further specify that a secular *Weltanschauung* as conceived here does not necessarily imply atheism or agnosticism although it may seem most logically congruous with the latter. Indeed, so long as commitment to a secular epistemology and to immanent human flourishing remains steadfast, the mere belief in a transcendent God, so long as confined to the realm of an individual’s innermost private conscience, would not be necessarily incongruous with a fully fledged secular way of life. Moreover, the true relevance of this last point will become manifest in the exploration of the relationship between secularism and pluralism to be undertaken below.

Secularism is compatible with many different philosophical approaches, such as monism, pluralism and relativism, and many different conceptions of human flourishing, such as those envisaged by liberalism, republicanism, and communitarianism. In short, so long as the focus remains within the realm of immanence and the attachment to the epistemological foundations of secularism (eg reliance on science, experience, public reason) sufficiently anchored to sustain a common language—or, to use a Wittgensteinian phrase, a common language game—secularism can thrive and remain conceptually and pragmatically coherent. With this in mind, the key questions in the context of constitutional democracy become: A) what does secularism need for itself? B) what does it require from others, that is, from proponents of other conceptions of the good? And, C) what, if anything, would secularism as a conception of the good wish freely to spread to proponents of non-secular perspectives?

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16 In this connection, purely private religious belief and worship would be akin to spiritual fulfillment through reading poetry, playing or listening to music, etc.
17 See infra, at__.
18 For a discussion of the differences among the three, see Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* 1998, 199-208.
19 Rosenfeld, *Just Interpretations* 215-225.
A. Secularism’s Needs in a Constitutional Democracy

Insofar as secularism is not a religion, it requires freedom from religion rights to pursue without unwarranted obstacles its human flourishing objectives. In this context, ideological secularism converges with institutional secularism. Just as in a modern secular constitutional polity religion cannot be allowed to interfere with freedom of belief or of conscience or of scientific inquiry, so too in the post-secular era secularism must enjoy the same rights to maintain its viability and integrity as a distinct conception of the good. Insofar as secularism as a conception of the good is akin to a religion, for example ‘secular humanism’, on the other hand, it does also call for freedom of religion rights. Such rights would be largely superfluous in a genuinely secular modern constitutional democracy, such as contemporary France. But, in a post-secular polity, secularism would have to compete with other ideologies without enjoying any prima facie advantage within the precincts of the prevailing constitutional framework. And that could well impinge on secularism’s pursuit of human flourishing much as the modern secular state may thwart religious pursuits. Thus, for example, just as freedom of religion rights would be necessary for purposes of overcoming secular bans on ritual slaughter for practicing Jews and Muslims, so too they would be for the benefit of secular humanists in a polity with a law against stem-cell research.

Contemporary polities customarily assume a very important role in providing education and in engaging in, sponsoring, and supervising scientific research. In the context of institutional secularism, government intervention in these areas ought to be unproblematic as it would naturally mesh with the basic tenets of secular ideology. In the absence of institutional secularism, on the other hand, ideological secularism would be vulnerable to majoritarian policies that are hostile to secular beliefs and objectives. Thus, for example, a religious public
school education hostile to any immanent perspective or religion driven restrictions on government conducted or sponsored scientific research would obviously adversely affect the vital concerns of ideological secularism. Under such circumstances, therefore, secularism would depend on constitutional protections in order to secure its paramount interests in an otherwise hostile political, ideological and institutional environment.

Ideological secularism has a message to convey and an agenda to pursue. The message in question is that the rejection of all transcendence need not result in ‘an empty public square’. On the contrary, from a secular standpoint, morals, ethics and the search for fulfillment and flourishing on this earth can be enriching and uplifting for all of humanity. Solidarity, concern for the other, as well the pursuit of individual and collective self-fulfillment can result in a rich and satisfying life that looms as highly worthy and hence factually and normatively superior to all alternatives based on obedience or subordination to a transcendent or divine entity. The agenda, on the other hand, is the achievement of the greatest possible freedom to pursue all avenues that may lead to the amelioration of human life and well being on this earth.\textsuperscript{20} This requires extensive freedom of conscience, speech, expression and scientific inquiry and experimentation that are only subject to limitations that would be constitutionally valid only if they could be justified under a ‘public reason’ standard\textsuperscript{21} that excludes all arguments based on transcendent, metaphysical or religious reasons. Thus, from an ideological secular perspective, religion based objections to abortion, stem cell experimentation, in vitro fertilization, cloning, assisted suicide or euthanasia and the like should be unquestionably constitutionally invalid. Similarly, all religion based arguments relating to sexual mores, gender differentiation, and

\textsuperscript{20} This broad secular conception of amelioration of conditions affecting or concerning humans would encompass such matters as animal protection, including animal rights, and environmental protection.

\textsuperscript{21} See fn 10 supra.
sexual orientation ought to be banished from official constitutional discourse, deliberation, and
decision-making. In short, ideological secularism calls for constitutionally guaranteed exclusion
of all religion based discourse and advocacy by public officials, such as judges and legislators,
within the realms of law and politics.

Ideological secularism would not only require negative constitutional rights against the state,
but also significant positive ones. Indeed, many of the prerequisites to human flourishing and
fulfillment as envisioned by secularism, such as research and advances in the sciences, medicine
and technology, cannot be, for the most part, realistically achieved through exclusive reliance on
the private sector. Accordingly, significant state subsidies would have to fill the gap produced by
seemingly inevitable private sector shortfalls. Moreover, these state subsidies should become
constitutionally mandated to insure against legal or political blockage by objecting religious
majorities.22 Furthermore, private education may be insufficient to guarantee inculcation of
secular values to the children of adherents to secularism. In that case, a positive constitutional
right to public school inculcation of the values in question would be clearly called for. There
may be, of course, several other areas in which advancement of the secular conception of the
good would require adoption of appropriate positive constitutional rights. All in all, then, it
seems inevitable that ideological secularism will require both negative and positive constitutional
rights in order to be in a position to meaningfully pursue its fundamental objectives.

22 It is of course plausible to object to constitutionally mandated state subsidies on purely secular grounds as would
be the case in a libertarian objection to such subsidies. The latter objection would of course be fully amenable to the
‘public reason’ standard. The upshot of this would either be a split within the secular conception of the good or a
plurality of such conceptions. Be that as it may, to the extent that ideological secularism or a version of it requires
state subsidies for scientific research, such subsidies should be constitutionally guaranteed against religiously
motivated attempts to block or derail them through law or politics.
B. Secularism’s Needs Against Proponents of Competing Conceptions of the Good

The line between constitutional restrictions on proponents of non-secular ideologies resulting from constitutional protections afforded secularists and those stemming from direct prohibitions against opponents of secularism may be often difficult to draw. Freedom to conduct stem-cell research with the aid of state subsidies would certainly frustrate and constrain those whose religion commands a universal ban on such research. Conversely, a ban on picketing abortion clinics would enhance the rights of those who choose to have an abortion. Nevertheless, for present purposes, it is useful to rely on a rough distinction between constitutional norms and practices meant to protect or enhance someone’s freedom of (or from) religion and constitutional tools primarily aimed at preventing someone from interfering with someone else’s above mentioned freedoms. Moreover, whereas Section A above focused on the former, this Section will address the latter.

In terms of constitutional constraints on intended or potential interference by proponents of competing conceptions of the good, ideological secularists would particularly benefit from three kinds of distinct prohibitions. These are: first, a prohibition against slandering, denigrating or inciting hatred or contempt against secularism; second, a prohibition against interfering with, or frustrating, a secularist’s access to goods or services that ought to be constitutionally guaranteed or legally available consistent with the precepts of ideological secularism; and, third, a

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23 A further complicating factor that will be glossed over for present purposes stems from the fact that different constitutions provide somewhat divergent mechanisms and tools to apportion constitutional rights and duties and to handle conflicts among competing constitutional rights. Thus, for example, the German Basic Law provides for individual rights as well as duties—eg, Article 14 guarantees a right to property that also entails obligations—and has been interpreted as applying to transactions among private parties. See Norman Dorsen et al, Comparative Constitutionalism: Cases and Materials (2d edn 2010), 896 (discussing Drittwirtschaft which extends application of constitutional norms to horizontal relationships). In contrast, the US Constitution is overwhelmingly oriented toward the grant of negative rights that can be asserted against the state. These differences can certainly lead to problems relating to practical applications of certain of constitutional norms, but need not be taken into account in a theoretical discussion about plausible optimal constitutional arrangements from the stand point of ideological secularism.
prohibition against interfering with the teaching of science in public schools and more generally with the integrity of scientific research and experimentation throughout the polity, except on grounds amenable to evaluation under the standards of public reason.

Secularism has been the object of many criticisms and attacks, some of them virulent and demeaning, such as accusations of amorality or immorality, lack of trustworthiness stemming from a complete absence of the fear of God, being the source of what Pope Benedict XVI termed the ‘dictatorship of relativism’, and many other evils perceived as conspiring to deprive human life of all meaning and to reduce human beings to depraved hedonism or to mere calculating mutual exploitation. In short, consistent with these lines of attack, any pursuit of flourishing that eschews appeal or recourse to the transcendent is bound to culminate in lack of dignity and integrity. Moreover, even in the context of institutional secularism, ideological secularists have been demeaned and cast as second class citizens by being treated less seriously than their ‘God fearing’ counterparts. Thus, for example, in the 1960’s the U.S. Congress allowed an exemption from military service in a war zone to conscientious objectors who based their claim on religious grounds, but not to those who did so on principled secular moral grounds. This particular instance of arbitrary discrimination was rectified through a judicial interpretation of the Congressional legislation in question that was so broad as to in effect rewrite

the law so as to equate transcendent and secular principled grounds for objection.\(^{29}\) In acting thus, the US Supreme Court was operating in a secular institutional setting framed by the US Constitution’s Establishment Clause\(^{30}\) which requires separation between the state and religion.\(^{31}\) More generally, whereas the sting of the above mentioned criticisms and attacks targeting secularism may be significantly blunted in the context of institutional secularism, it would be an altogether different matter in many other institutional settings. Indeed, it is not hard to imagine secularists without the backing of institutional secularism feeling existentially threatened by concentrated and intense attacks along the lines evoked above.

For secularists to pursue their conception of the good peacefully in surroundings where their dignity and integrity are not under serious or constant threat, ‘hate speech’ against secularists and ideological secularism ought to be subject to legal sanction. In most constitutional democracies, hate speech that incites to hatred of its intended target group gives rise to criminal or civil liability.\(^{32}\) Hate speech spreads slanderous and demeaning stereotypes against racial, ethnic and religious groups and it not only tends to injure the latter directly, but it also seeks to gain converts among the broader audience exposed to its message. Just as falsely branding a racial minority as ‘criminals’ or a religious minority as inherently ‘dishonest’ or ‘violent’ ought to be sanctioned, so too should casting secularists as ‘morally depraved’ or ‘unworthy of trust’, particularly if the latter constitute a besieged minority in a religion dominated polity. Furthermore, depending on the prevailing overall circumstances, it may not be enough to

\(^{30}\) U.S. Const., Amendment I (1791).
\(^{31}\) How much separation is required by the Establishment Clause may be a matter of dispute, but even those who reject the total separation standard agree that the state cannot endorse particular religions or back any religious coercion. See *Abington School District v Schempp* 374 US 203 (1963); *Lemon v Kurtzman* 403 U.S. 602 (1971).
prohibit demeaning attacks on proponents of certain conceptions of the good, but it may also be necessary to sanction slanderous outbursts directed at the very conceptions involved. For example, The European Court of Human Rights (ECtHR) upheld Austria’s prohibition against exhibiting a film profoundly offensive to Catholics as it caricatured and disparaged their religious doctrine.33 Also, Muslim minorities in Western democracies have claimed that disparagements of their religion, amounting to ‘insult to the Prophet’ profoundly insulted them and deprived them of their dignity and equality rights.34 What underlies claims such as these is a sense that, amidst virulent hostility and ridicule against a conception of the good, those committed or drawn to it –especially if they are a distinct minority within the polity35--will feel assailed and intimidated and thus unable to pursue what is of utmost importance to them on an equal basis with their fellow citizens who adhere to competing conceptions of the good. In a setting in which devotion to the transcendent vastly predominates, concentrated attacks on secularism as valueless and as bereft of all morality might well place unacceptable strains on secularists and dampen the pursuit and teaching of ideological secularism. For that reason, imposing restrictions on slandering and grossly ridiculing ideological secularism becomes arguably a sine qua non for a fair and dignified opportunity to embark and comfortably remain on a secularist path.

The second kind of constraint that ideological secularists would wish to impose on others bent on interfering with their pursuits relate to the realm of access to material goods and services rather than to that of ideas. Ideological secularism is strongly committed to complete freedom of scientific inquiry and experimentation and to accessibility to the full panoply of resulting goods

34 See infra chapter by Robert Post.
35 In this connection, it bears specifying that the Catholics concerned in the Preminger case belonged to the majority religion within the relevant polity.
and services subject only to limitations justifiable under a public reason standard. Thus, for instance, secularists wish to have unobstructed access to contraception including the ‘morning after pill’, abortion, assisted procreation, the benefits associated with stem cell research, and end of life options including assisted suicide. Interference with the access in question by hostile others acting on religious grounds have typically involved two kinds of conduct: obstruction and harassment, such as have been experienced at US abortion clinics\(^\text{36}\), on the one hand, and refusal to provide government services or to sell certain stocked products in commercial establishments open to the public, such as pharmacies, on grounds of conscience\(^\text{37}\), on the other hand. Both kinds of conduct involved should be legally prohibited, particularly since those who feel bound by religious constraints usually have many alternative employment options that should allow them to avoid conflicts between their religion and their work obligations. Furthermore, whereas the prohibitions involved may in certain circumstances allow for certain accommodation of religious objectors consistent with secular pursuits of the good, in certain other circumstances, the prohibitions should remain strict. For example, a pharmacy with several employees may arrange for those non-objecting among them to cover for their objecting colleagues in filling a customer’s request for an abortive contraceptive. In contrast, in the case of civil servants in charge of providing marriage licenses, no one who would refuse to handle same sex couple requests should be allowed to be employed in that capacity.\(^\text{38}\) Indeed, in the latter situation, the mere knowledge that a government official would refuse to honor a citizen’s right because that


\(^{38}\) For example, in the United States, the Supreme Court of Vermont held that the state constitutional free-exercise rights of town clerks are not violated when they are fired for refusing to issue civil union licenses to same-sex couples because of religious objections. See *Brady v Dean* 790 A.2d 428, 435 (Vt. 2001).
official found the right in question religiously repugnant would demean the citizen involved and curtail his or her dignity and equality rights.

The third type of constraint that secularists would feel necessary to impose on religiously motivated others who object to modern science in whole or part is a prohibition against interfering or tampering with the teaching of science in public schools. As experience in the US makes plain, certain aspects of science, such as evolution theory, arouse much opposition from certain religious quarters. This opposition has given rise to efforts ranging from banning the teaching of evolution theory\textsuperscript{39} to instituting a coupling of such teaching with that of creationism.\textsuperscript{40} From a secularist standpoint, all of this is objectionable, but the push for teaching creationism in science class is in a way much more pernicious than efforts to ban the teaching of evolution. In the later case, we have a straightforward clash between religion and science; in the former, an attempt to obfuscate the crucial difference between the discourse of science and that of religion. Evolution theory is subject to the strictures of scientific inquiry whereas creationism is not. By obfuscating the clear line between the two, the religious objector intimates that empirical science coexists on the same plane as metaphysics. As the integrity and independence of science is essential to the secular way of life, it is therefore imperative that threatening and undermining these be prohibited.

C. Secularism’s Needs to Proselytize

Many conceptions of the good, including numerous religions, consider spreading their truth to outsiders an important part of their normative mission. This is also the case for ideological secularism with its roots in the Enlightenment and its commitment to the separation between

\textsuperscript{39} See \textit{The State of Tennessee v Scopes} , 152 Tenn. 424 (1925).
faith and reason. In some respects secularism’s proselytizing is similar to its religious counterparts: the urge to convert others to one’s views stems from conviction in one’s truth and belief that others will be better off if they switched to one’s way of life. In other ways, however, secularism differs from proselytizing religions. Most obviously, the latter ultimately rely on metaphysics whereas secularism is committed to remain within the realm of science and public reason. But also, beyond that, secularism’s proselytizing is both defensive and expansive and it can achieve its main aims through partial rather than full conversion of outsiders.

Defensive proselytizing involves trying to convert outsiders as a means to save or better secure one’s conception of the good and the way of life associated with it. Whereas it may be advantageous for a proselytizing religion to count on a larger cohort of adherents, the main thrust of such proselytizing is likely to be expansive as the guiding motivation may typically be what is taken to be a divine command to spread the true religion to the heathen. Secularism, in contrast, may need to garner greater numbers to afford a minimum of protection to science and to public reason which are both indispensable to its conception of the good and its way of life. If, as discussed above, the teaching of evolution can be jeopardized in an institutionally secular polity like the US, as evinced by the fate of Copernicus’ scientific discovery and Galileo’s loss of freedom during the Renaissance, science’s status can be very precarious where religion hostile to it has a firm grip on the relevant polity. Under such circumstances, increasing the numbers of science’s defenders could only boost the latter’s chances of survival.

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41 Whereas there is a clear factual divide between science and metaphysics (eg divine revelation), no normative implications follow from that fact standing alone, and the secularist must therefore draw on more than science and public reason in attempts to gain new converts to her conception of the good.
Secularism’s expansive proselytism is in part commensurate with its religious counterpart: it seems natural to wish to convince others of the truths and perceived virtues of one’s own conception of the good. But going further, secularism’s expansive proselytism complements its defensive one. Indeed, the development and deployment of science and the predominance of public reason in public discourse require numbers, and without a critical mass the full benefits that these offer to those who pursue secularism would seem beyond reach.

Finally, completely unlike its typical religious counterpart, secularism may achieve its most crucial proselytism aims through partial conversion. Thus, acceptance of science without relinquishing commitment to transcendence and filtering religious views to make them fit within the discourse of public reason may well be all secularists need from outsiders to secure the benefits of their way of life. In contrast, it seems inconceivable that a spreader of true religion could be satisfied with anything less than full abandon of false religion to embrace the true one in all its exclusivity.

In view of the foregoing, the question is what secularism’s specific needs to proselytize would require from the constitutional system beyond the customary freedoms of speech and of association that allow approaching others to try to convince them to switch to one’s views? The answer is that secularism needs in addition some enshrinement of protection and promotion of science in the constitution—a need that does not arise so long as institutional secularism is constitutionalized—and some constitutional commitment by the state and public officials to adhere to public reason in governance and to provide certain key services to the citizenry, such as public education. Moreover, secularists can argue that religion-based opposition to satisfying these secularist constitutional needs should be disregarded to the extent that many who oppose science on religious grounds do not hesitate to take full advantage of the benefits stemming from
science or the use of public reason. Thus, many an opponent of evolution theory would not hesitate to avail himself of the full benefits of contemporary medicine should his health or that of a family member be at stake. Whereas it may not be logically contradictory to attack science while at the same time benefitting from it, it does constitute what philosophers call a ‘performative contradiction’ as it involves conduct that undermines the depth and integrity of the professed anti-science stand.

III. Secularism in Competition Against Other Conceptions of the Good

Ideological secularism’s amenability to partial conversion on matters of utmost importance to its way of life suggests that it is open to significant accommodation of competing conceptions of the good. This is not surprising as institutional secularism and liberalism are themselves open to inclusion of a fairly extensive plurality of competing conceptions of the good. In the context of institutional secularism and of liberalism, secularism has the upper hand and is able to limit tolerance of those ideologies that pose a threat to its hegemony. Ideological secularism in a post-secular age does not possess such advantages, however, and must thus compete on an equal footing with all other conceptions of the good it encounters within the polity in order to secure a path to survival. With this in mind, I will now briefly examine how the competition between ideological secularism and three kinds of religion, namely fundamentalist religion, strong religion, and liberal religion, is likely to shape up. Before proceeding, though, I wish to make clear that the three kinds of religion just mentioned are meant as constructs designed to serve as a useful heuristic device. Actual religions are complex and dynamic and they are subject to differing interpretations and approaches. These religions may approximate one of the constructs in question or even, in part, all three of them, being fundamentalist in some respects, strong in

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44 See John Rawls, *Political Liberalism* (1993), 64 (advocating a version of liberalism compatible with a ‘reasonable pluralism’ of competing conceptions of the good).
others, and even liberal on some issues. Be that as it may, the constructs relied upon here should suffice to outline the main obstacles and opportunities that ideological secularism is likely to encounter as it seeks to carve out its place in a polity with a full panoply of the religious ideologies typically found in numerous present day constitutional democracies.

Before proceeding any further, it is necessary to address another key preliminary point. Just as religion is not monolithic, neither is secularism. For example, Nazism, fascism, and Stalinist style communism are all secular to the extent that they reject appeal to the transcendent and confine self-fulfillment to the bounds of a human community here on earth. Yet for all their secular credentials, these above mentioned ideologies would be more antagonistic to the aims of Enlightenment based liberal secularism than a number of fundamentalist religions, and presumably all strong and liberal religions. In the context of a comparison of all existing ideologies, the most important cleavages would most likely not be between religious and secular worldviews. Indeed, it would seem much more imperative to divide ideologies according to the degree to which they provide respect for human dignity and are committed to fundamental equality among all human beings. Moreover, according to the latter criteria, it would seem inevitable that a mix of religious and non-religious ideologies would emerge as the most commendable and another mix also comprised of religious and secular worldviews as the least acceptable. For present purposes, suffice it to stipulate that ideological secularism as used throughout this Chapter is understood as referring exclusively to Enlightenment based liberal, republican, communitarian and/or pluralistic secularism to the exclusion of authoritarian or totalitarian secularism as exemplified by Nazism, fascism and Stalinism. Finally, from an ideological secularist perspective, authoritarian or totalitarian secularism is amenable to rejection as unacceptable either through use of public reason or on account of the latter’s rejection of
public reason. In other words, if all versions of secularism were to accept public reason, then persuasive arguments against Nazism, etc., should suffice; and if Nazism, etc., proved completely impervious to public reason, then such ideologies would not be, in the last analysis, any more secular than those worldviews wholly committed to the transcendent.  

With these distinctions in mind, fundamentalist religion as understood here takes its own truth as both absolute and as applying to the whole polity or the world at large without any room for acceptance or compromise with any other religious or non-religious world view. As Habermas puts it,

Fundamentalist worldviews are dogmatic … they leave no room for reflection on their relationship with the other worldviews in which they share the same universe of discourse and against whose competing validity claims they can advance their positions on the basis of reasons. They leave no room for ‘reasonable disagreement’.  

As fundamentalist religion leaves no room for discussion or compromise, coexistence with it depends on the particular nature of its aims and the domain over which it feels obligated to impose them. Crusading or Jihadist religion that is bent on converting the infidel, if necessary by force, and that has worldwide aspirations seems to afford no room for any other conception of the good. On the other hand, a fundamentalist religion that forswears all violence and that shuns all contact with all those who do not share its truth may well be able to coexist with proponents of other conceptions of the good within the same polity. In the end, whether, and to what extent,

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45 See Balibar, *Saeculum: Culture, religion, idéologie* 84 (Discussing ‘secular religions or political religions…such as Nazism and especially Communism (which embraced a much more profound messianic dimension)’ (my translation).

46 A distinction must be drawn, for present purposes, between religious fundamentalism as a religious matter and as a politico-constitutional one. From a religious standpoint, a ‘fundamentalist’ is someone who interprets holy texts literally; from a politico-constitutional standpoint, in contrast, a ‘religious fundamentalist’ is one who considers his or her religion as the repository of absolute truth and who insists that the state be ruled exclusively pursuant to the dictates of the true religion. Unless otherwise specified, ‘religious fundamentalism’ will be used throughout in its politico-constitutional meaning.

coexistence will be possible depends both on inter-communal and intra-communal factors. Key inter-communal issues would be whether the non-bellicose fundamentalist religion at stake would be willing to abide by the law of the polity and whether its adherents would insist to impose part or all of their way of life through the democratic process—assuming, for example, that they constitute a majority of the population-- on the rest of the citizenry. The principal intra-communal issue, on the other hand, would be whether that fundamentalist religion’s prescriptions regarding the treatment of its own members would meet the minimum standards of a contemporary pluralist polity. Thus, for instance, if a completely insular and otherwise law abiding fundamentalist religion insisted on a ritual that in essence placed some of the young teenage girls within their religious community in a state of sexual slavery, and deemed that an indispensable part of its religious way of life, then it would seem imperative for the polity involved to intervene in the said community’s internal affairs.

Strong religion, unlike its fundamentalist counterpart, is open to dialogue with outsiders and even to change over time, but it remains adamant and unmoving on certain dogma and practices that have important intra-communal and often inter-communal implications. For example, those religions that steadfastly keep women from entering the clergy though they may accommodate other feminist demands from within their ranks cannot approximate contemporary gender equality standards intra-communally. Furthermore, a religion, such as contemporary Catholicism, that seeks to promote polity wide legal bans on abortion which would impinge on the liberties of those whose religion does not ban abortion as well as on the secular, would in part impose its religious proscriptions inter-communally. More generally, strong religion has historically promoted the subordination of women and systematically stood in the way of gender-based equality. As Susan Moller Okin emphasizes,
[T]he basic texts of Judaism, Christianity, and Islam are rife with sexism: the Torah/Bible reverses the reality of reproduction so that the first woman is made from a man, tells a history of the Jews from which women are virtually absent, and advises wives to obey their husbands. The Qur'an explicitly advocates beating women ‘from whom you fear disobedience’, and suggests that some barrier be placed between the sexes, which has been interpreted in a myriad of ways, including heavy compulsory veiling and the ‘seclusion’, or socially enforced imprisonment, of women in their homes, in much of the history of Muslim peoples... [Thus] the more orthodox (but by no means necessarily fundamentalist) versions of all three-including Orthodox Judaism, Catholicism and some Orthodox and Protestant branches of Christianity, and many variants of Islam-still discriminate against women and reinforce their subordination within religious practices, and within and outside the family, in numerous significant ways.48

Although not all strong religions are alike in terms of seeking to dominate or heavily influence the public sphere, they are all likely to leave a marked imprint on the politics and the culture of the polities in which they enjoy a significant presence. Accordingly, strong religion is bound to confront secularism at both the inter-communal and the intra-communal levels. Moreover, the conflicts between strong religion and secularism may be more daunting than those between the latter and fundamentalist religion. This is because unlike fundamentalist religion which is typically isolated and often alien to mainstream culture, strong religion may share much in common with more liberal religious traditions and with secularism thus allowing strong religion to seep into the general culture and to fully participate in the political arena.49 In other words, in as much as strong religion looms in the minds of secularists as much less ‘the other’ than fundamentalist religion, it may present more daunting challenges than the latter at both the intra-communal and the inter-communal levels.


49 It is of course possible for fundamentalist religion, particularly if it were that of the majority within the polity, to play a decisive cultural and political role. However, in a truly diverse polity, it seems more likely that a strong religion that is closer to the general culture and that can engage in ‘reasonable dialogue’ on many important issues— eg the Catholic Religion’s commitment to easing the burdens of poverty—would have a much greater impact on inter-communal matters.
From the perspective of ideological secularism, strong religion’s endeavors to impose its dictates inter-communally, such as blanket prohibitions on abortion, euthanasia or divorce, must clearly be fought against. It is far from obvious, however, whether strong religion’s intra-communal impositions that are squarely contrary to liberal or secular precepts, such as religious commands or practices that appear to relegate women to subordinate positions within the relevant religious community, ought to be actively opposed or whether it would be preferable to tolerate them. From a pragmatic standpoint, intra-communal religious perceptions or practices that risk to have inter-communal influence or to feed into prejudices or illiberal tendencies within the polity’s general culture ought to be vigorously countered. In contrast, purely self-contained intra-communal practices might better be left alone to avoid unnecessary conflict. In short, ideological secularism would have to fight strong religion at least in part and how far such fight ought to optimally extend would depend, as we shall see below in Part III, on whether one subscribes to liberal or pluralist principles.

Liberal religion unlike its two counterparts discussed above seems largely compatible with ideological secularism. Indeed, the principal difference between religions that have embraced the essential tenets of liberalism—eg, several progressive Protestant denominations and Reform Judaism-- and ideological secularism is that the former involve a commitment to the transcendent whereas the latter does not. To the extent that liberal religion is unreservedly committed to science and to the subjection of public discourse to the standard of public reason as well as to gender and sexual orientation based equality, it seems fully compatible with ideological secularism. On the other hand, liberal religion’s embrace of the transcendent may, on
occasion, align it with other religions against secularism’s agnosticism or atheism.\(^a\) For example, proponents of all religions may join forces to argue against atheists and agnostics that human beings are better off if they entertain some relation to the transcendent and that therefore the state should promote non-denominational devotion to a Supreme Being in all facets of public life, including public education. In such a campaign by all religions, ideological secularists might well feel threatened or belittled in their way of life, and thus compelled to combat even liberal religion’s largely tolerant and seemingly readily adaptable conception of the transcendent.

### III. Comprehensive Pluralism’s Mediation as Between Ideological Secularism and its Competitors

As already noted, comprehensive pluralism regards all conceptions of the good that count with adherents within the polity as *ex ante* equal in worth and dignity. Moreover, to the extent that there are conflicts and contradictions among existing conceptions of the good, comprehensive pluralism seeks to mediate among them with the aim of achieving *ex post* the greatest possible peaceful coexistence among the greatest possible number of competing conceptions of the good.\(^b\) Given that all actual polities inevitably favor some conceptions of the good over others, the first task of comprehensive pluralism, in what I have termed its ‘negative moment’, is to equalize all conceptions of the good. This involves a shift from *factual* inequality to *counterfactual* equality. Thus, for example, in the context of institutional secularism, comprehensive pluralism’s negative moment requires imagining a constitutional and institutional

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\(^a\) Strictly speaking, ideological secularism is wholly consistent with agnosticism, but not with atheism. Asserting the non-existence of God seems best understood as a transcendent negation. Nevertheless, atheism may also be interpreted as being based on a negation of the transcendent. Accordingly, it makes sense for ideological secularism to be inclusive of both agnosticism and atheism.

\(^b\) For a more extended discussion of comprehensive pluralism’s handling of competing conceptions of the good, see Rosenfeld, *Law, Justice and the Clash of Cultures* 204-210. The discussion that follows summarizes the arguments elaborated in the book.
reordering that would strip secularism of its existing advantages and place it on an equal footing with all its ideological competitors. Similarly, in a case of institutional privileging of one religion or of a particular instantiation of it, such as Ultra-Orthodox Judaism in Israel, the negative moment in question demands articulation of the pertinent ordering changes which would make it possible to wipe out the advantages at stake. Furthermore, once all existing conceptions of the good have been counterfactually equalized, comprehensive pluralism deploys its second ‘positive moment’ designed to foster counterfactual construction of the best imaginable plausible constitutional and institutional setting for the peaceful coexistence of the greatest possible number of competing conceptions of the good within the polity. In this second moment, the conflict among competing conceptions of the good is subjected to mediation pursuant to application of the normative standards issuing from comprehensive pluralism. That, in turn, requires that each conception and the norms it propounds, which figure as ‘first-order’ norms, be subjected to comprehensive pluralism’s own norms which emerge as ‘second-order’ norms. Accordingly, the total ban on abortion applicable to all within the polity, which is a first-order norm officially embraced by the Catholic religion, and the conflicting advocacy for a broad constitutional right to an abortion, which is a first-order norm embraced by ideological secularism, will have to be handled through application of comprehensive pluralism’s second-order norms further discussed below.

A. Comprehensive Pluralism’s Conception of ‘Justice as Reversible Reciprocity’

Comprehensive pluralism’s conviction that fostering plurality and diversity is a paramount good provides the framework for its arsenal of second-order norms. Consistent with

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52 See Gila Stopler’s chapter in this book.
53 As it proceeds within the realm of the counterfactual, the sequence leading from comprehensive pluralism’s negative moment to its positive one is a logical one but not necessarily a temporal one.

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this, the first task associated with comprehensive pluralism’s second positive moment is to ascertain to what extent competing conceptions of the good are actually or potentially compatible. Some citizens within a polity may insist that it is a God given religious duty to help the poor whereas others may vehemently assert that the welfare of the poor is a most urgent humanist concern. Although the first of these positions is religious and the second secular, they can both be plausibly equally accommodated. On the other hand, where conceptions prove truly incompatible, in part or whole, comprehensive pluralism subjects these to its criterion of ‘justice as reversible reciprocity’, a centerpiece of its second-order norms. This latter criterion of justice goes beyond mere equality among persons or of persons as possessors of actual or potential conceptions of the good. It does so, moreover, in order to stress equality among actual conceptions of the good (subject only to limitations and restrictions resulting from application of comprehensive pluralism’s second-order norms) as the highest expressions of the autonomy and dignity of those who embrace them. In short, justice as reversible reciprocity postulates that full equality among persons requires recognition of prima facie equality among the full panoply of conceptions of the good to which these persons respectively adhere.

In case of conflict between two conceptions of the good, justice as reversible reciprocity requires first that proponents of each of these switch sides and imagine the conception they oppose from within as if it were their own. Thus, if a committed secularist confronts a devout Catholic, for instance, and each of them seeks to imagine as best as possible how it is to live the perspective of the other from within, then they should end up with a clear understanding of the extent to which their respective conceptions may be mutually accommodated and to which they

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54 It is of course conceivable that these two positions would be at least partially incompatible as where the religious duty demanded exclusive reliance on private acts of charity and the secular effort insisted on institutionalization and pervasive state intervention to assure complete satisfaction of the basic welfare needs of all the polity’s poor.

55 Rosenfeld, Just Interpretations 249.
seem bound to remain mutually incompatible. Consistent with this, the secularist and the Catholic may both conclude that their respective conceptions of the good should be ultimately compatible as means to self-fulfillment and flourishing, or that they are in part compatible in the realms of social and economic policy, and in part incompatible in the realm of personal morality. Or else, they may also conceivably conclude, after trading places, that Catholicism and secularism are wholly incompatible as their search for self-fulfillment, respectively within the confines of the transcendent and within those of the immanent, render them radically irreconcilable.

Radically irreconcilable conceptions of the good with literally nothing in common should be quite rare, particularly since typical modern personhood and citizenship involves partaking in numerous different and often conflicting conceptions of the good. Take, for example, the case of a German Catholic feminist woman. As a citizen of the EU, she is likely to share perspectives with fellow citizens from other member-state countries. As a feminist, she may seek to ‘feminize’ her Catholicism, and conversely, as a Catholic, to ‘catholicize’ her feminism. In this context, moreover, the different conceptions involved are more likely to be open to one another in a dynamic give and take than hermetically closed and impermeable to any outside influence. In short, the woman of our example is likely to confront inconsistencies and even contradictions due to her multiple allegiances, but this need not result in incompatibilities forcing her to choose one of her allegiances over another—eg, Catholicism over feminism or vice versa.

Secularism is certainly not a radically irreconcilable conception of the good as it shares many first-order values and normative commitments with liberal religion and also in all likelihood with strong religion. On the other hand, ideological secularism may be confronted to a radically irreconcilable conception, such as a belligerent fundamentalist religion with zero
tolerance for the infidel. In that case, even after application of the criterion of justice as reversible reciprocity, only one of the two conflicting conceptions could be accommodated and that would have to be to the exclusion of the other. Superficially, as plurality would be impossible under the circumstances, pluralism would seem indifferent regarding which of the two contenders would be accorded rule over the polity to the complete exclusion of the other. Upon further consideration, however, because of its (at least partial) openness to other conceptions of the good, enshrining secularism does not foreclose future plurality. Accordingly, as secularism accepts at least some of comprehensive pluralism’s second-order norms—in this case some measure of tolerance of competing perspectives—it deserves priority over belligerent fundamentalism even if that were not to yield *ipso facto* greater actual plurality within the relevant polity.

Where partially irreconcilable conceptions of the good clash over particular first-order norms or scarce goods, justice as reversible reciprocity prescribes first of all that a comparison be drawn concerning the relative importance of the norm or good involved to each of the conceptions involved. Thus, if a good in question is crucial to one conception and only marginal to another, then all concerned should agree, after switching places, that the scarce good should go to the proponents of the conception to which it is most crucial. Thus, if there were only one bottle of wine left and a religious group claimed it for ritual use purposes while a secular group wished it available for recreational purposes, then both groups should agree under justice as reversible reciprocity that the religious group’s claim should prevail.

In cases where the first-order norm or good under dispute is of equal importance to each of the conceptions of the good involved, then no priority prevails, and resolution consistent with justice as reversible reciprocity would involve ordinary political means, such as negotiation or
majority rule. Thus, if both Catholics and Jews needed the only bottle of wine left for ritualistic purposes, and if the respective rituals at stake were equally important within the perspective of each of the two religions involved, then negotiation—eg, the Catholics will concede the wine to the Jews this time in exchange for the latter yielding to the former next time—or majority rule—there are twice as many Catholics as Jews poised to benefit from the ritualistic use of the only available bottle of wine—would produce the best possible outcome under the circumstances.

Conflicts involving issues of priority of a disputed norm or good among competing conceptions of the good ought to be subjected to constitutionalized second-order norms whereas those conflicts that do not raise such questions of priority ought to be subjected to ordinary politics operating within a constitutional order elaborated in conformity with second-order norms. Moreover, in any comparison, whether at the constitutional or infra-constitutional level, there ought to be compensation against actually privileged perspectives—eg, secularism in a institutionally secular setting or a dominant official religion in a religiously diverse polity—and in favor of a systematically underprivileged perspective—eg, a persecuted minority religion. For purposes of the following discussion, however, it is assumed that neither secularism nor its rival religious perspectives happen to be either privileged or unfairly disadvantaged.

B. Two Paramount Conflicts: Religions Unite against Secularism in Name of Pluralism and Secularism Demands Complete Freedom of Scientific Pursuits over Religious Objections

Starting from a counterfactual tabula rasa that eliminates the legitimacy of all attacks on either secularism or religion as enjoying any actual advantage within the polity, two conflicts emerge as paramount under pluralism’s criterion of justice. The first pits all religions against secularism based on the claim that secularism undermines pluralism to the extent that it denigrates and fights against all transcendence. The second conflict, in turn, stems from secularism’s demand that the freedom to teach, to pursue and to practice science (subject only to
public reason based limitations), and where necessary to obtain state subsidies and support for those purposes, be constitutionally enshrined against all objections stemming from religion.

The first of these two conflicts that presumably unites all religions against ideological secularism can be summarized as follows. In the competition for constitutional entrenchment, all religions united on the issue of, commitment to, and promotion of, the transcendent could well argue that any constitutional recognition of ideological secularism, beyond what would be warranted under individual freedom of conscience, belief and expression rights, would impoverish rather than enhance plurality. This would be because a large number of religions are in various ways committed to the transcendent and in case ideological secularism were to benefit from constitutional advantages, its opposition to transcendence would over time erode commitment to it and hence eventually lead to a lesser diversity of conceptions of the good within the polity.56 Conversely, according constitutional priority to conceptions of the good that are committed to the transcendent would best serve maximizing plurality in the face of the conflict under consideration.

Granting constitutional advantages either to ideological secularism or to religions committed to the transcendent would have to be categorically rejected under pluralism’s second-order norms. Indeed, there is a crucial distinction between fair competition among diverse conceptions of the good and anti-competitive or destructive conduct by proponents of one conception of the good against other such conceptions. Pluralism is satisfied regardless of whether the actual number of accommodated conceptions of the good increases or decreases so long as fair and open competition among all conceptions at play prevails. This can be best understood perhaps by drawing an analogy to the ideal of a free market economy. So long as a competitor runs a rival

56 For a more extended discussion of this argument, see Rosenfeld, Law, Justice and the Clash of Cultures 171-174.
out of business by offering a better product or by operating more efficiently, the market economy is well served and its aims clearly furthered. However, if a competitor engages in monopolistic practices or destructive competition, such as by intimidating a rival’s customers or by destroying the rival’s merchandise, then the market economy is thwarted, and if these evils spread, eventually in danger of being totally destroyed. Analogously, fair competition among conceptions of the good, through mutual exposure, open discussion, attempts at persuasion including religious and secular proselytizing (so long as it only addresses adults and is non-intimidating and non-coercive) is deemed a paramount good from the standpoint of comprehensive pluralism. In contrast, seeking to ban or drive away competing conceptions of the good by mobilizing the state or its institutional apparatus against them is inherently antipluralist as it artificially and coercively limits the choices open to all.

Actual fair competition among diverging conceptions of the good may on occasion result in a diminution in the number of available alternatives. That in itself, however, is no evil from a pluralist standpoint. Pluralism is not concerned about the total number of existing alternatives actually in play in and of itself but rather about every person or group within the polity having all the opportunities she or it deems necessary or helpful for purposes of furthering her or its course toward self-realization and self-fulfillment. Thus, for example, if certain religions of the past, such as those of the Ancient Greeks or of the Aztecs, no longer appeal to anyone within a polity, then, all other things remaining equal, that polity will have experienced a net loss in religious diversity. It would be absurd, however, to conclude that because of the consequent diminution of practiced religions the polity in question had become less pluralistic from the standpoint of comprehensive pluralism.
Based on the preceding observations, it becomes clear how a pluralist constitutional order should handle the opposition to secularism advanced jointly by a diverse multiplicity of religions. With secularism as one conception of the good among many and on the same footing as all the religious ones, pluralist constitutionalism should reject any privileging of religion or secularism and ought therefore legitimate free and fair competition among various religions and among the latter and secularism.

The second conflict mentioned above differs from the first because it does not involve a clash of ideologies taken as whole. It concerns instead a conflict between something, namely the free pursuit and spread of science, that is of the highest importance for secularism but that is at the same time vehemently opposed, in part or whole, also as a matter of highest importance, by certain religions. Taken in the abstract, this conflict is hard to handle for comprehensive pluralism because it involves two equally strong squarely opposed claims—eg, for Catholics, human life starts at conception versus for secularists, science does not lend support to the claim that human life as such begins at conception—without any apparent hint relating to any order of priority that might conceivably emerge as a consequence of application of the justice as reversible reciprocity standard. However, as already indicated above, ideological secularism’s claim for constitutionally enshrined priority to be given to science is not made all things being equal, but in the context of inconsistencies or contradictions in the positions of those opposing (in part57) the secular approach to science. In essence, according to this claim, a religion that accepts and makes use of science in the areas of health, communications, transportation, etc., engages in a performative contradiction when it seeks to prevent, or to interfere with, the pursuit

57 A religion that rejected science in whole and that forbade the use or benefit of any of the products of science could well avoid all inconsistency and hence all vulnerability to the secular claim under consideration. The conflict between such religion and secularism will not be considered any further here as the most populous religions in Western constitutional democracies, Christianity, Islam and Judaism, all accept many important benefits of modern science in areas such as health, communications, or transportation.
of science by proponents of other conceptions of the good, such as secularism. In other words, in the course of switching perspectives pursuant to justice as reversible reciprocity, the proponent of the religion that wishes to suppress science in part ought to realize that he cannot have it both ways—e.g., prohibit the teaching of evolution theory in public schools while benefiting from the latest medical advances in public hospitals—once he understands from within the relevant non-religious perspective that the language game of science has a unity and integrity of its own and, in a large number of cases, that his own religion requires recourse to some or all available medical means to save or prolong life. As a consequence of this, secularism’s pro-science and religion’s partially anti-science stances are not equivalent and the latter ought to give way to the former.

The priority of secularism’s pro-science commitment has important but limited consequences under pluralism. This priority requires that the protection and promotion of science be granted constitutional status and that any religious-based call for prohibition or limitation of the teaching, practice or application of science be strictly confined to the intra-communal sphere. Thus, a religion should be empowered to limit or counter science within its own community of believers, but not beyond. On the other hand, the priority at stake should not bar any attempt to limit particular scientific pursuits or applications so long as any resulting limitation is justifiable on public reason grounds. And this should be the case regardless of ultimate motivation, including purely religious ones. With this in mind, so long as secularism competes with religions that accept significant benefits deriving from science, the applicable constitutional order should

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58 Orthodox Judaism, for example, requires that all available means be used to save or prolong life. See George Robinson Essential Judaism: A Complete Guide to Beliefs, Customs and Rituals (2001), 200.
protect and promote the teaching and pursuit of science subject to limitations justifiable under a public reason standard.

The pluralist handling of the two most important conflicts just discussed sheds light on how to mediate in the cases of the other salient conflicts identified above. These conflicts boil down to: the hate speech, defamation, or blasphemy conflict; the conflict over access to goods and services necessary to secure flourishing and self-fulfillment; the conflict over teaching what is essential for secularism or religion both intra-communally and inter-communally; and, the conflict over the legitimate scope of the pluralist, as opposed to the liberal, reach into intra-communal affairs. I now turn to brief discussion of each of these.

C. The Conflict over Hate Speech

As noted in Part II, secularism would wish protection against being demonized, demeaned and defamed by religion. Similarly, religion seeks to enlist the state against blasphemy, disrespect and ridicule.\textsuperscript{59} These two objectives though seemingly indistinguishable often end up in conflict to the extent that each of the respective ideologies involved tends, because of its very worldview, to cast a negative gloss on the other. For secularism, religion may be highlighted by superstition and prejudice; for religion, secularism typified by immorality, relativism, selfishness and self-indulgence. From the standpoint of pluralism, secularism and religion stand in the exact same position with respect to this particular conflict. On the hand, pluralism should seek to lessen this conflict by spreading the following message inspired by Spinoza’s insight that reason and religion may be regarded as furnishing two distinct paths to the same truth.\textsuperscript{60} Secularism and religion offer different means to human flourishing and self-fulfillment and as such should be

\textsuperscript{59} See supra at\.\textsuperscript{___}.

\textsuperscript{60} See Baruch Spinoza, \textit{Ethics}, in \textit{The Collected Writings of Spinoza} vol 2 (Edwin Curley trans, 1985), 7.
inter-communally projected more in terms of their respective human potential than in that of the
differences that set them apart. On the other hand, while maintaining strict equality between the
two, pluralism can handle the conflict by either prescribing a high degree of censorship of
expression deemed disrespectful of secularism or religion or by insisting on broad tolerance for
such expression.

The first of these two alternatives is highly unattractive as it would thwart all ideological
discussion and dispute and interfere with fair competition among distinct conceptions of the
good. For example, under this alternative, the statement, drawing on Nietzsche’s account\textsuperscript{61}, that
Christianity is religion fit for slaves would be sanctioned as blasphemy whereas any religiously
based statement that homosexual sex is against nature and highly immoral would be punishable
as defamatory against secularism (and those religions that share liberal secularism’s position on
this issue). The second alternative, in contrast, allows for wide ranging debate and criticism and
is for that reason far preferable although it is by no means free of shortcomings. Indeed, there is
an important difference between denigrating an ideology and defaming those who adhere to it,
but the line between the two is often difficult to draw. It is one thing to say that secularism is
immoral or amoral and another to proclaim that all secular persons ought to be barred from
holding a high governmental office because anyone who lacks the fear of God is morally unfit.
Accordingly, in spite of the difficulties involved, pluralism would ultimately protect all opinion
regarding all conceivable ideologies, whether secular or religious, but would at the same time
sanction hate speech or group defamation against the adherents to an ideology based on the sole
grounds of their adherence.\textsuperscript{62} In the last analysis, wherever pluralism may ultimately draw these

\textsuperscript{61} See Friedrich Nietzsche, \textit{On the Genealogy of Morality} (1887).
\textsuperscript{62} I gloss over many complexities that would have to be confronted in concrete situations where certain
circumstances prevail. For example, the very joining of a Nazi party may well subject the latter’s new adherent to
condemnation and contempt. But would that involve hate speech or group defamation? Conversely, claiming falsely
lines, it should do so from a vantage point that remains as much as possible neutral as between secularism and religion. 63

D. The Conflict over Scarce Goods and Services

In the conflict over access to goods and services in the pursuit of flourishing and self-fulfillment, secularism and religion should stand on an equal footing, except to the extent that the priority of science discussed above is implicated. Moreover, in the context of this conflict, pluralism commands particularly strong vigilance against both secular and religious built-in biases. For example, it may be easy to make a liberal secular case against male circumcision practiced on minors or the ritual slaughter of animals to meet the requirements of kosher or halal meat, but before curtailing these practices a thorough application of the criterion of justice as reversible reciprocity should be mandatory to determine whether the proposed limitations would be proportionate. 64 Conversely, based on a majority religion with great influence on a polity’s culture and values, there may be deeply ingrained convictions against assisted procreation, same-sex couple adoption, single motherhood, and assisted suicide. Precisely because of the depth and width of these convictions, it is incumbent to subject them to thorough review under the above pluralist criterion.

The conflict under consideration encompasses questions of access as well as instances of refusal to provide, or assist in obtaining, particular goods or services as a matter of conscience. A

63 This does not mean of course that application of an appropriate neutral pluralist standard would necessarily result in a neutral outcome. If a new religion claimed that Nazism was divinely mandated, then, under any plausible pluralist standard, an ad hominem attack against adherents to the new religion would not be objectionable in the way that a similar attack would be on adherents to secularism or to a traditional strong or liberal religion.

64 Although the present discussion is proceeding under the assumption that all the conflicting conceptions of the good in play operate under a (counterfactual) regime of strict equality, it bears noting that in the (actual) case in which secularism is aligned with the culture of the majority religion—eg, Christianity—to attack minority religion—eg, Judaism and Islam—practices, the potential for bias would appear significantly increased.
devoutly religious person working in a pharmacy may refuse to honor a request to purchase a ‘morning after’ contraceptive or a feminist and gay rights activist may object to dealing with a person who openly endorses a religious ideology widely perceived as misogynist and homophobic. Whereas certain existing constitutional democracies tend to defer to religion-based refusals based on conscience but not to those not derived from religion, pluralism requires strict equality between religious and secular objections to provide goods or services as a matter of conscience. Accordingly, for pluralism the question boils down to determining the extent to which to equally honor religious and secular objections based on conscience.

As long as no disproportionate consequences would ensue, pluralism counsels accommodating secular and religion based conscientious objectors on an equal basis. There ought to be one exception to this general rule, however, in the case where the conscientious objector’s job involves performing an official state function and refusal to do so would offend the dignity of any group within the polity. Thus, a civil servant in charge of processing marriage certificates should not be entitled to claim an objection based on religious grounds to refuse to handle a request by a same sex couple in a jurisdiction that provides for same sex marriage. Similarly, a secular objector should not be allowed to refuse handling a similar request by a couple with an avowed commitment to a religious ideology that is misogynist and homophobic. Moreover, such prohibition is certainly justified under justice as reversible reciprocity in as much as the mere knowledge that the state allows a public servant to discriminate on the basis of sexual orientation or religious affiliation is an affront to the dignity of those who are targeted by the refusal at stake. On the other hand, the public servant affected can easily avoid the conflict in question by selecting another civil service position where no such conflict is likely to arise.

65 See Post chapter in this volume.
66 See Brady v Dean 790 A.2d 428, 435 (Vt. 2001).
E. Conflicts over Teaching Religious and Secular Perspectives

Teaching is indispensable for purposes of preserving, growing internally, adapting and expanding the reach of any conception of the good. Also, in most cases, the needs and inspirations of particular conceptions of the good require teaching at both the intra-communal and inter-communal levels. It is obvious that inter-communal teaching claims by mutually inconsistent ideologies would lead to conflicts, but perhaps less so that intra-communal teaching initiatives might also. Consider, for instance, the teaching at a network of private Islamic schools in the United Kingdom, based on Saudi government-supplied textbooks, that proclaimed that Jews ‘looked like monkeys and pigs’, that prescribed, inter alia, throwing those who had engaged in gay sex off a cliff, and that illustrated where hands and feet should be amputated as punishment for theft in accordance with the Shariah.67 This latter intra-communal teaching involves incitement to inter-communal hatred and could well condition young minds to acceptance of violence against members of other communities within the polity. On the other hand, different kinds of intra-communal teaching may not target any outsiders, but may nonetheless raise conflicts as might the purely intra-communal teaching of religious doctrine promoting the subordination and submission of women to men.

In the case of inter-communal teaching, such as in public state schools, except for the priority of science discussed above, pluralism requires *prima facie* equality for all ideologies subject to further adjustment in terms of compliance with pluralism’s second-order norms. It follows from this that there ought to be an affirmative obligation to teach inter-communally pluralism’s philosophy of mutual understanding, mutual acceptance and mutual accommodation as well as its second-order norms, including belief in equal dignity and tolerance based on a Spinozistic emphasis on religion and secularism as different paths to human flourishing and self-fulfillment.

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(while acknowledging that regarding them thus does not preclude considering each of the two from within the perspective of the other as an erroneous or less desirable means to the same end). Beyond that, the prescriptions of justice as reversible reciprocity would depend on contextual factors—e.g., how antagonistic are visions of secularism and religion and those of the different religions active within the relevant polity—and could range from extensive treatment of all competing ideologies to a virtual ban on teaching ideological secularism and religion in their own right inter-communally. All things being equal, pluralism evinces a clear preference for thorough presentation and free discussion of all ideologies actively pursued within the polity. However, where antagonisms are too intense and exacerbation of prejudice more likely than better mutual understanding, it seems wiser to adopt a gag rule relating to the particulars nourishing the prevailing conflicts. This latter position is analogous to that prohibiting ethnic-based political parties inscribed in the constitutions of countries rife with ethnic animosity and conflict. By forcing political concentration away from ethnic issues, the polity may improve its chances to maintain the minimum of unity necessary for its survival. Similarly, drawing public education away from fierce wars between secularism and religion or among diverse religions, may better serve the cause of pluralism in situations in which no realistic path to greater inter-communal opening is discernible.

In the case of intra-communal education, a distinction must be drawn between teachings that are incompatible with pluralism, such as the propositions about Jews and Gays imparted in certain Islamic schools in the UK mentioned above, and teachings that are merely inconsistent.

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68 References to secularism and religion would of course always be appropriate where pertinent in other contexts, such as the teaching of history. Thus, it would be important to discuss the respective religious ideologies that led to a particular religious war, or that influenced a policy of combating poverty as well as to discuss the link between secularism and the philosophy of the Enlightenment.

69 See eg the Constitution of the Republic of Ghana, ch 7, s 55 (4), which states that ‘Every political party shall have a national character, and membership shall not be based on ethnic, religious, regional or other sectional divisions’.
with pluralism’s own essential thrust, such as a non-proselytizing peaceful fundamentalist religion’s message to its adherents that all other religions and ideologies are absolutely false and that it is a mortal sin to engage in any religious discussion or social interaction with any outsider. Intra-communal teaching that is incompatible with pluralism should be banned\(^{70}\) whereas that which is inconsistent with pluralism should be permitted, provided there is intra-communal compliance with the teaching of a mandatory basic state imposed curriculum that includes a discussion of pluralism’s own norms as they pertain to civic and political life.\(^{71}\)

A more thorny difficulty arises in the context of purely intra-communal teaching that neither addresses nor targets any outsider but that nonetheless may cross the line between inconsistency and incompatibility both internally and externally. This would be the case where a self-contained religious community imparts purely intra-communally teachings and precepts that are categorically misogynist and homophobic. On the one hand, if the community in question recognizes and respects the right of exit of all its members and allows for wide ranging intra-communal debate of its views, then its teachings would seem inconsistent but not necessarily incompatible with pluralism. On the other hand, if the community in question is very visible in a polity with a vigorous inter-communal struggle to achieve full equality based on sex, gender and sexual orientation, then the potential spillover effects from the teachings and practices of the religious community at stake may well trigger a move from the inconsistent to the incompatible. Ultimately, whether pluralism ought or not tolerate such intra-communal teaching in any given

\(^{70}\) This would not prevent the Islamic schools in the example above to teach that Judaism is a false religion or that homosexual sex is a sin for Muslims and that accordingly it must remain strictly prohibited within the Islamic community.

\(^{71}\) Such minimum curriculum consisting of basic subjects such as math, sciences, language, history, geography and the country’s constitution and political institutions is imposed on religious schools in several countries. Such curricular obligations, however, are in many cases ignored or circumvented, particularly where credible prospects of state enforcement are lacking. See Stopler chapter, at—(discussing systematic non-compliance by the ultra-Orthodox in Israel).
instance would depend in significant part on contextual factors. Some further light might be shed on this conflict in general, however, through examination of the next and last conflict listed above, namely that concerning the contrast between the respective approaches of liberalism and pluralism toward intra-communal ways of life that are strongly illiberal.

F. Liberal versus Pluralist Handling of the Internal Life of Illiberal Religious Communities

The conflict over how far to reach within the intra-communal affairs of a strongly illiberal community concerns the latter’s way of life as well as its teachings. Moreover, the principal difference between liberalism and comprehensive pluralism in relation to this conflict stems from the contrast between liberalism’s unshakable link to individualism and pluralism’s *prima facie* indifference as between individual-regarding and group-regarding concerns. Liberalism’s individualism requires systematic subordination of group-regarding claims to basic individual-regarding concerns, such as individual liberty, equality or dignity. In the case of a strongly illiberal community that teaches and practices subordination of women and homophobic mores, therefore, a consistent liberal is bound to urge active inter-communal intervention into the community involved to promote gender and sexual-orientation based equality. The only constraint upon this liberal imperative would come from the freedom of religion rights of individual members within that community as opposed to any communal rights based on the operative religious ethos. Also, wherever the ultimate liberal balance between individual freedom of religion and individual equality may be drawn, at a minimum the consistent liberal would insist on imposing intra-communally liberal education requirements and the application of inter-communally based liberal constitutional and legal norms to all intra-communal dealings with a narrow exception drawn for religious worship, association and expression. In the end, in as much as secularism and liberalism share many first-order norms in common, the spread of
liberalism into illiberal religious communities is bound to result in providing a distinct advantage to ideological secularism against religion or at least all but liberal religion.\textsuperscript{72}

From the standpoint of pluralism, on the other hand, the mere fact that a religious community is intra-communally illiberal does not justify intervention from the outside. Take for example a religious community that preaches and practices what clearly amounts to the subordination of women from a liberal perspective. Such subordination is certainly inconsistent with comprehensive pluralism’s normative precepts as framed by its second-order norms, but it is not necessarily thereby incompatible with the latter.\textsuperscript{73} Thus, if the religious community in question gives its women some voice in communal affairs and grants a general right of exit to all its members, men and women alike, then it is by no means apparent \textit{prima facie} whether liberal intrusion or continuation of the illiberal status quo would better conform with pluralism’s ultimate aims. There is a pluralist argument in favour of outside intervention and it is essentially twofold: (1) The religious group provides a bad example that may inspire some to attempt to reverse inter-communal liberal gains in the implantation of gender-based equality; and, (2) most women born into the religious group and systematically fed its ideology may not fully appreciate their state of subordination or, even if they do, may be too trapped or inhibited to leave the group. These arguments are countered, however, by others militating against outside interference which are also essentially twofold: (1) What appears as subordination from one perspective may not be subordination from another, and suppression of what does not conform to the views of the majority may ultimately prove unduly inegalitarian (as between different conceptions of the good within the polity); and (2) if one seeks to deny recognition to group-regarding differences that

\textsuperscript{72} There is a strong argument that liberalism calls for institutional secularism, which will not be pursued further in this chapter.

\textsuperscript{73} This example is treated at greater length in Rosenfeld, \textit{Law, Justice and the Clash of Cultures} 88-89 in the context of the contrast between (liberal) equality-as-identity and (pluralist) equality-as-difference.
seem unpalatable to a progressive liberal majority, one may well end up frustrating the deployment of pluralism.

The apparent subordination of women in the above example should be settled through application of the principle of justice as reversible reciprocity. Accordingly, women belonging to a group that allegedly subordinates them should consider their status from the perspective of outsiders, critics, and so on, as compared to their own, and to decide whether, when aware of all available options, they would continue with their own group or opt out. Although it is impossible in practice to fully experience the world from the perspective of another, it certainly seems plausible that women living within a culture that others consider defective from the standpoint of gender-based equality would nonetheless choose to remain within that culture even if they could fully intuit all the benefits and drawbacks of all available alternatives.74

Beyond that, pluralist resolution of the two arguments in favor of inter-communal intervention and the two against the latter is dependent, in significant measure, on contextual factors that are likely to differ from one setting to the next. Thus, the claim that a culture that appears to subordinate women provides a bad example only seems seriously troubling in the context of a society that has not yet firmly implanted liberal equality. In one that has, in contrast, it might well be the minority culture that stands out as non-egalitarian that would appear more vulnerable to intolerance. In any event, if inter-group channels of communication are open, and if the minority culture though benefiting from a fair amount of autonomy cannot avoid openness to other groups and to institutionalized pluralist norms, then it may be subject to pressure for

74 There are cases where the trade-offs are quite familiar as when Orthodox Jewish or Muslim women who work side by side with secular women, in a country like the United States, can compare notes, and nonetheless consciously determine that for them secularism would be a less desirable alternative. Of course, these women cannot shed their background, history, upbringing, family, etc., and thus their conclusions would only approximately satisfy the test imposed by justice as reversible reciprocity.
inner reform. This is manifest in the movements that have sprung in several religious communities that bar women from the ministry and in which they advocate change opening the way to greater gender-based equality.

Concerning the argument that those women that are subordinated may not be fully aware of their status, beyond what has already been said, it should be added that the risk of misperception is not one-sided. Indeed, the outsider’s risk of misperceiving unfamiliar mores as causing subordination may be equivalent to the insider’s risk of misjudging to what extent her role within her culture may conform to some acceptable conception of gender-based equality. Furthermore, if on account of the dangers of misperception one were to automatically fall back on liberalism, one would not only sacrifice the diversity of a multi-cultural polity but also possibly unwittingly restrict the reconciliation of diversity and equality in difficult or borderline cases. Suppose, for instance, that a religion proclaims men and women to be equal in the eyes of God but nonetheless provides for traditional sex differentiated roles within its community. Should the state intervene, consistent with pluralism, in the case of a woman member of that religion who is familiar with liberalism but who insists that life in accordance with transcendent equality among the sexes suits her much better than what she regards as shallow liberal gender-based parity? It seems clear that at least in some such situations comprehensive pluralism would counsel against any outside intervention.

Given the above detailed differences between how liberalism and pluralism would respectively handle purely intra-communal religious illiberalism, ideological secularism would seemingly fare better under liberalism than under pluralism. If all relevant contextual factors are properly accounted for, however, the actual disadvantage likely to be experienced by secularism looms as relatively minor. Moreover, such disadvantage would principally affect the scope of the
secularism’s freedom to proselytize within certain anti-secular religious communities within the polity.

IV. The Fate of Ideological Secularism in a Pluralist Constitutional Ordering of the Relationship Between the State and Religion

The fate of ideological secularism in a post-secular pluralist constitutional democracy is in the end not that different than it was supposed to be in a liberal Enlightenment-based polity that constitutionally enshrined institutional secularism. On a purely theoretical plane, ideological secularism fares better under liberalism than under pluralism. Under liberalism, secularism has an unwavering priority over religion in the public sphere, civil society and education—at least in public education and even to a significant extent in private education inasmuch as its spread into the intra-communal precincts of illiberal religious communities is called for as indicated above. Under pluralism, in contrast, secularism is in principle the equal of religion. Moreover, although submission to pluralism’s second-order norms may on occasion de facto favor secularism, on other occasions, as exemplified by the case of the illiberal religious community that pluralism would exempt from state imposed liberal teachings discussed in Part III above, secularism would have to yield to religion. In the end, what makes secularism under pluralism more vulnerable than it is under liberalism is its dependence on contextual factors in terms of its prominence in the constitutional arena. If cast exclusively against a strong religion which happened to repudiate science wholesale, for instance, secularism under pluralism would fare far worse than under liberalism as, under such circumstances, pluralism would not lend any support to the inter-communal diffusion or teaching of science.

When approached from a more practical historically grounded perspective, however, not only do the advantages of liberal secularism over its pluralist counterpart largely vanish, but also in
certain important ways pluralist secularism may end up topping its liberal alter-ego. The evening out of the two secularisms results principally from an important contextual factor operative in all industrialized contemporary constitutional democracies: as repeatedly emphasized throughout, all the major prevailing religions to a large extent accept or endorse science. On the other hand, in the transition from a modern to a post-modern appreciation of institutional secularism\textsuperscript{75}, especially in a historico-political setting infused with the revival of religion, institutional secularism may well become weakened through an often disguised and in part unconscious return of previously (constitutionally) repressed religious narratives, norms and values.

The return of repressed religious material occurs in all institutionally secular constitutional polities regardless of how strictly they impose a separation between the state and religion or how thoroughly they purport to expel religion from the public sphere. Moreover, this return of the repressed makes use of numerous different discursive strategies that include conflating religion and culture, reframing the religious as secular through displacement, and concealing religious bias in the very formulation of the seemingly most antireligious version of institutional secularism. The first of these three strategies is well illustrated by the approval under Italy’s current secular constitution of the mandatory display of the crucifix in public school classrooms. As expressed by an Italian court, ‘the crucifix is the symbol of our history and our culture and, as a consequence, of our identity … and also of the principle of secularism’\textsuperscript{76}. More specifically, as the same court emphasized, there is ‘a perceptible affinity … between the essential core of Christianity, which … focuses on tolerance and the acceptance of the other, and the essential

\textsuperscript{75} The difference in this context between a modern and a post-modern understanding of institutional secularism is that whereas the former regards institutional secularism as being neutral among religions (and among religious and secular ideologies), the latter does not, and leaves no room for any neutral institutions. For a more extensive discussion of the overall contrast between modern and post-modern perspectives and their impact on the interplay between liberalism and pluralism, see Rosenfeld, \textit{Law, Justice and the Clash of Cultures} 52-56.

\textsuperscript{76} TAR (Regional Administrative Tribunal) Veneto, 17 March 2005, Decision n. 1110, para. 12.4.
core of the Italian Constitution’, which is based on fundamental rights. Although the court admitted that ‘during history, many incrustations were settled on the two cores, and especially on Christianity’, it nevertheless insisted that the harmony between Christianity and the Constitution endures because, ‘despite the Inquisition, anti-Semitism and the Crusades’, it is ‘easy to recognize the most profound core of Christianity in the principles of dignity, tolerance and religious freedom and therefore in the very foundation of a secular state’.77

The second strategy has been prevalent in the United States which has incorporated various religious ideas, values and symbols in the public sphere in spite of its constitutional ‘wall of separation’ between Church and State.78 Thus, the phrase ‘In God We Trust’ is inscribed on every dollar bill, religious ministers recite a prayer at the beginning of sessions of the US Congress, and, as will be briefly discussed below, the US Supreme Court has designated the Christian ‘crèche’ a secular symbol when displayed in a public square.79

In contrast to the first two strategies, the third strategy operates in ways that are largely invisible. This third strategy is pursued in the name of French ‘laïcité’ which is cast as strictly neutral with respect to religion and regarded by many as even fundamentally antireligious.80 In spite of this, as Michel Troper’s conceptual history of the term vividly brings to light, laïcité was the product of a particular accommodation between the French Catholic Church and the state.81 To be sure, the deployment of laïcité in France required some restraints on religion, thus

80 See Rosenfeld, Law, Justice and the Clash of Cultures 155-156.
81 See Michel Toper chapter in this volume.
somewhat relativizing Catholicism within the polity. But at the same time, *laïcité* was molded in theory and practice so as to render the public space as compatible as possible with the culture associated with Catholicism, if not with the religion itself. This phenomenon is succinctly captured in the French popular term *Catho-laïque* used often to refer to a Catholicism that has adapted to *laïcité*, but that also connotes the corollary of a *laïcité* that has been fitted for harmonious coexistence with Catholicism. Moreover, consistent with this, French *laïcité* has on occasion been used to bolster Catholicism at the expense of minority religions such as Islam.82

To illustrate in greater detail how the return of repressed religion can undermine institutional secularism and circumvent mainstay liberal principles suffice it to focus on a single case, the already alluded to US Supreme Court *crèche* decision, *Lynch v. Donnelly*, which furnishes an exemplary use of the second of the three strategies briefly sketched above. *Lynch v. Donnelly* was a 5–4 decision that concluded that the display of the *crèche* on city-owned property was not violative of the U.S. First Amendment’s Establishment Clause, which erects a ‘wall of separation’ between religion and the state that at a minimum forbids the state from officially preferring one religion over others. Consistent with this, the US Supreme Court’s majority had to overcome two daunting doctrinal hurdles. First, it had to find that the display of the *crèche* had a secular purpose and, second, that such display did not amount to an official endorsement of religion by the municipality involved.83To overcome the first hurdle, the Court’s majority found the municipality’s purpose to be secular as it regarded the placement of the *crèche* within a larger Christmas display that included Santa Claus and reindeer near the heart of the municipality’s shopping district as an enticement to engage in Christmas shopping and thus inure to the benefit

82 See Mancini, ‘The Power of Symbols and Symbols as Power’ 2664 (discussing France’s policy on the Islamic veil as at once a reinforcement of France’s Catholic heritage and an attack against Islam).
83 465 US at 679.
of local merchants. Furthermore, to overcome the second hurdle, the court’s majority reasoned that display of the crèche did not endorse (any particular) religion any more than does inscribing the words ‘In God We Trust’ on U.S. coins.

What the Court’s majority in *Lynch* ended up doing was to merge the secular and the religious or to subordinate one of the two to the other, with the consequence of causing offence to all but proponents of mainstream (liberal) religion, who in the United States happen to be mainly those who belong to Protestant denominations that embrace a muted version of the Christian religion that blends well with principal values associated with liberalism and secularism. It is obvious that atheists and agnostics would feel left out and not taken seriously. But so would non-Christian believers, such as Jews and Muslims. Finally, even deeply committed Christians, for whom the crèche, which depicts the nativity, has profound religious significance, would have reason to be offended by having their religion trivialized and its sacred symbols reduced to props used for purposes of boosting retail sales.

A pluralist constitutional approach, in contrast, could easily avoid all these problems. From a pluralist standpoint, the issue would not be whether the crucifix or the crèche could pass as sufficiently secular or sufficiently assimilable into secular culture. The concern would be, instead, whether or not these religious symbols would be so significantly divisive as to hinder rather than promote the greater self constraint and greater tolerance required to ensure the greatest possible accommodation of the greatest possible number of religious and non-religious conceptions of the good within the polity. In some settings, the crucifix, the crèche, or other

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84 465 US at 690.
85 465 US at 676.
86 In this connection, it is not surprising that some of the strongest advocates of a strict separation between religion and the state in the U.S. have been certain religious leaders of strong religions. See eg Testimony of J. Brent Walker, General Counsel and Assoc. Dir., Baptist Joint Committee on Public Affairs Before the Senate Committee on the Judiciary, Federal Document Clearing House, Oct 25, 1995.
dominant religious symbols may emerge as oppressive and exclusionary when officially embraced or endorsed by the state. In other settings, however, they may well have no such connotations and may therefore be promoted by the state alongside secular symbols without fostering significant divisiveness. More generally, what is crucial from the standpoint of pluralist constitutionalism is that the constitutional architecture and the constitutional jurisprudence of the polity involved be equipped so as to properly distinguish between inclusionary and exclusionary entanglements between ideological secularism and religion (as well as between different religions) and between the state and religion.

More generally, pluralist constitutional ordering would ideally be grounded in a counterfactual areligious ideal—‘areligious’ being understood here as neutral and impartial as between ideological secularism and religion and as between different religions (as opposed to ‘areligious’ as an equivalent to ‘irreligious’ or to indifferent to religion).87 Furthermore, consistent with this areligious ideal, all competing conceptions of the good would pursue their respective objectives and be taken into constitutional account in the open. This would obviate the need for discursive strategies, such as the three listed above, which have proven useful in efforts to dislodge the supremacy of institutional secularism and to nullify the advantages that the latter bestows on ideological secularism. Under the areligious counterfactual, secularism and religion would start on an equal footing and would in principle coexist as full equals. In practice and subject to comprehensive pluralism’s second order norms, however, in most cases ideological secularism will end up with some advantages over religion.88 The most obvious advantage is that to be secured through a constitutional guarantee regarding the inter-communal diffusion of

87 See Rosenfeld, *Law, Justice and the Clash of Cultures* 150-154 for a more extended discussion of the areligious ideal.
88 These advantages may not come into play in case of liberal religion to the extent that its commitment to the transcendent poses no threat to secularism.
science. Less obvious, but important nonetheless is the advantage that secularism seems bound to enjoy by virtue of being more compatible with pluralism’s second-order norms than religions, or at least fundamentalist and strong religions, are likely to be. Indeed, with secularism’s advantage regarding science in hand, it seems highly probable that secularism will be more open to plurality than a large number of religions that start out as its full equals. Thus, for example, after securing its advantage regarding science, secularism may well be comfortable with a pluralism that allows, except in cases of egregious illiberalism, each ideological community to thrive and flourish intra-communally. Catholicism, in contrast could not wholeheartedly accept such pluralist regime so long as it remains committed to the inter-communal eradication of abortion.

As already emphasized, actual pluralist constitutional ordering is context dependent and accordingly bound to vary from one polity to the next. Moreover, as noted in the above discussion on the US crèche case, pluralism can be as compatible with strict separation between religion and the state as with extensive state promotion of religion and secularism alike, depending on the circumstances. What pluralist constitutionalism does not countenance is concealed undermining of ideological secularism or, in by far most cases, the taking away of secularism’s ex post advantages over religion. Because of its combined greater flexibility where appropriate and its greater firmness where called for, pluralist constitutionalism is therefore better suited to the aims of ideological pluralism in the post-secular polity than is its liberal counterpart.

V. Conclusion
Paradoxically, because of its exalted status in polities committed to institutional secularism, ideological pluralism has come under concerted attacks. These attacks cast secularism both as an obstacle intent on drowning out the calls for suitable recognition issuing from various religions
and as an unworthy ideology that fosters relativism if not downright nihilism. In short, so long as institutional secularism endures, it can be portrayed as a colonizer that seeks to keep religions institutionally colonized. Also, as its legitimacy is increasingly challenged, secularism becomes subject to depiction as an ever more arbitrary and superfluous colonizer seeking to hold on to privileges that have become purely abusive in a war of institutional liberation waged by religions vying for wholehearted recognition of their full dignity.

By shedding all the vestiges of institutional secularism, and going instead to the starting gate as one ideology among many (all of these being in principle equal to one another), secularism puts on an entirely different face. Ideological secularism thus becomes a conception of the good on a par with its religious counterparts in the search for fulfillment and flourishing. As such, like religion, ideological secularism seeks goods for itself and protection from others, including religions, which stand in the way of the path to the good it has set out for itself.

By abandoning the privileges it enjoys within the ambit of institutional secularism and subjecting itself to the prescriptions of pluralist constitutionalism (not necessarily out of outright conviction, but as a lesser evil to the war of ideologies), ideological secularism admittedly becomes in principle more vulnerable to disadvantage or subordination in certain conceivable scenarios. To be sure, if pitted exclusively against a single fundamentalist religion that forsakes all of science, or against an alliance of strong religions unbendingly committed to a relentless combat against the ungodly, ideological secularism may at best secure bare tolerance under the aegis of pluralist constitutionalism. Such scenarios, however, are far from the conditions that currently prevail (and that in all likelihood will remain in place for the foreseeable future) in contemporary industrialized constitutional democracies. The latter scenarios are typically characterized by a plurality of religions including fundamentalist, strong and liberal ones that are
as likely to compete among one another as they are sure to do so against secularism. Moreover, in the overall picture most likely to emerge in the scenarios in question, ideological secularism would by no means only figure as the enemy of religion. Instead, there would undoubtedly be many occasions where secularism would align with liberal religion against strong or fundamentalist religion or even with strong religion against fundamentalist religion. In addition, in such a scenario, most if not all religions would at least de facto embrace science to a significant extent.

In the context of the latter scenario which currently prevails in constitutional democracies, pluralist constitutionalism would not only insure ideological secularism’s status as an equal, but also propel it as a primus inter pares. And that far from relegating religions to any second rank status would provide them with the best possible accommodation and path to self-fulfillment, short of a constant war against all or permanent subordination of the many to a single dominant religion. Ironically, in the present predicament, pluralist constitutionalism turns ideological secularism’s newly found vulnerability in the advent of a post-secular age into an advantage over its most likely competitors. That advantage, however, goes hand in hand with insuring the best possible conditions for peaceful coexistence among the greatest possible number of religions vying for self-fulfillment and flourishing within the polity.